91-406

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BRUCE L. WALLACE,
Respondent.

Petition for a Writ of Certiorari to the Circuit Court of the City of Norfolk, Virginia

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PETITION FOR A WRIT OF CERTIORARI

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September 5, 1991

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QUESTIONS PRESENTED

1. Whether railroad locomotive cab noise exposure standards promulgated by the Federal Railroad Administration ("FRA"), the federal agency charged by Congress with setting all safety standards for the rail industry, preempt application of generic noise standards promulgated by the Occupational Safety and Health Administration ("OSHA")?

2. Whether the court below erred in allowing the plaintiff, a locomotive engineer who alleges occupationally induced hearing loss, to introduce generic OSHA noise exposure regulations as evidence of the appropriate standard of care, and in instructing the jury that it could consider noncompliance with the OSHA regulations as evidence of negligence, when the FRA has issued specific locomotive cab noise regulations, which differ from the generic OSHA standards?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the case contains the names of all parties.

Petitioner Southern Railway Company (recently renamed Norfolk Southern Railway Company) is wholly owned by Norfolk Southern Corporation. The other subsidiaries and affiliates of petitioner are:

Arrowood-Southern Corporation Company
Arrowood-Southern Executive Park, Inc.
Atlantic Investment Company
Charlotte-Southern Hotel Corporation
Lamberts Point Barge Company, Inc.
Lamberts Point Docks, Inc.
Nickel Plate Improvement Company, Inc.
Norfolk and Western Railway Company
Norfolk Southern Industrial Development Corporation
Sandusky Dock Corporation
Virginia Holding Corporation
Norfolk Southern Properties, Inc.
North American Van Lines, Inc.
NS Fiber Optics, Inc.
NS Transportation Brokerage Corporation
NW Equipment Corporation
Pocahontas Development Corporation
Pocahontas Land Corporation
Triple Crown Services, Inc.
Wheelersburg Coal Terminal Company
Camp Lejune Railroad Company
Central of Georgia Railroad Company
Chattanooga Station Company
Chattanooga Terminal Railway Company
Chesapeake Western Railway Company
Cincinnati New Orleans and Texas Pacific Railway Company
Citico Realty Company
Elberton Southern Railway Company

Georgia Midland Railway Company
Georgia Northern Railway Company
Georgia Southern and Florida Railway Company
Highpoint, Randleman, Asheboro and Southern Railroad Company
Interstate Railroad Company
Lake Erie Dock Company
Live Oak, Perry and South Georgia Railway Company
Louisiana Southern Railway Company
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company
National Investment Company
New Orleans Terminal Company
Norfolk and Portsmouth Belt Line Railroad Company
North Carolina Midland Railroad Company
Shenandoah-Virginia Corporation
St. Johns River Terminal Company
South Western Rail Road Company
Southern Rail Terminals, Inc.
Southern Rail Terminals of Alabama, Inc.
Southern Rail Terminals of North Carolina, Inc.
Southern Railway-Carolina Division
Southern Region Coal Transport, Inc.
Southern Region Industrial Realty, Inc.
Southern Region Materials Supply, Inc.
Southern Region Motor Transport, Inc.
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company
Toledo Belt Railway Company
Transylvania Railroad Company
Virginia and Southwestern Railway Company
Wabash Railroad Company
Yadkin Railroad Company

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Petition for a Writ of Certiorari to the Circuit Court of the City of Norfolk, Virginia

---

PETITION FOR A WRIT OF CERTIORARI

The Southern Railway Company ("Southern") hereby petitions for a writ of certiorari to review the decision of the Circuit Court of the City of Norfolk, Virginia.

OPINIONS BELOW

The judgment of the Circuit Court of the City of Norfolk (App. 1a-2a, *infra*), filed without opinion, is not reported. The orders of the Virginia Supreme Court denying the petition for appeal (App. 8a, *infra*) and denying the petition for rehearing (App. 9a, *infra*) are not reported.

JURISDICTION

The judgment of the Circuit Court of the City of Norfolk was entered September 17, 1990. The order of the Virginia Supreme Court denying Southern's petition for appeal was entered on February 27, 1991. The order of that court denying Southern's petition for rehearing was

entered on June 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Section 202 of the Federal Railroad Safety Act of 1970 provides in pertinent part:

> The Secretary of Transportation . . . shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970, and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety. . . .

45 U.S.C. § 431(a).

Section 6(b) of the Occupational Safety and Health Act of 1970 ("OSH Act") provides in pertinent part:

> "the Secretary [of Labor] may by rule promulgate, modify, or revoke any occupational safety or health standard . . .

29 U.S.C. § 655(b).

Section 4(b)(1) of the OSH Act provides in pertinent part:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. § 653(b)(1).

STATEMENT

A. Federal Regulation of Workplace Safety

Workplace safety regulation is carried out by a profusion of federal, state and local governmental agencies. At the federal level the Occupational Safety and Health Administration ("OSHA"), a division of the Department

of Labor, is the general author and administrator of workplace safety standards. *See* 29 U.S.C. § 653(a) (OSH Act applies to all employment performed in workplaces in the several states). OSHA's jurisdiction is not exclusive, however; there also exist a number of industry-specific federal agencies, whose broad regulatory authority over particular industries includes the power to set workplace safety standards.[1]

The existence of multiple regulators raises the specter of inefficient duplication of efforts and inconsistent regulatory schemes with resulting uncertainty as to which standards apply. It was just such confusion and inefficiency that Congress sought to avoid in enacting section 4(b)(1) of the OSH Act, which bars OSHA from regulating "working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1).[2]

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[1] These include, *inter alia*, the Federal Aviation Administration, the Office of Pipeline Safety, the Coast Guard, and the Federal Railroad Administration ("FRA"), the federal agency whose regulations are at issue here.

[2] The Senate Report explained that the OSH Act

> does not modify other Federal laws prescribing safety and health standards. The bill does not authorize the Secretary of Labor to assert authority under this bill over particular working conditions regarding which another Federal agency exercises statutory authority to prescribe or enforce standards affecting occupational safety and health.

S. Rep. No. 91-1282, 91st Cong., 2d Sess. 22, reprinted in 1970 U.S.C.C.A.N. 5177, 5199. Similarly, in recommending the Conference Report, Representative Steiger noted that the "terms of the bill will apply to all businesses having an effect on commerce except where another Federal Agency other than the Department of Labor is exercising statutory authority to prescribe or enforce occupational safety and health standards or regulations." 116 Cong. Rec. 42,206 (1970). *See also Donovan v. Texaco, Inc.*, 720 F.2d 825, 827 (5th Cir. 1983) ("Section 4(b)(1) evidences a general Con-

During the last fifteen years there has been a considerable amount of litigation in both state and federal courts (and before the affected federal agencies) as to (1) what action the "other" federal agency must take to effect preemption of generic OSHA regulations, and (2) the scope of preemption, that is, the scope of the "working conditions" which the dominant agency carves out of OSHA's jurisdiction by the exercise of its independent statutory authority. To date, no consensus has emerged on either issue. On the first issue some circuits require only that the dominant agency assert its authority in a policy statement, *see, e.g., Velasquez v. Southern Pac. Transp. Co.*, 734 F.2d 216, 218 (5th Cir. 1984), while others require actual promulgation of a competing regulation, *see, e.g., Columbia Gas of Pa., Inc. v. Marshall*, 636 F.2d 913, 915-16 & n.7 (3rd Cir. 1980). The courts that have addressed the second issue diverge on whether the term "working conditions" in section 4(b)(1) contemplates a "discrete environment" (e.g., a locomotive cab), *see, e.g., Southern Railway v. OSHRC*, 539 F.2d 335, 338-39 (4th Cir. 1976), or a "discrete hazard" within that environment (e.g., noise exposure in a locomotive cab), *see, e.g., Southern Pac. Transp. Co. v. Usery*, 539 F.2d 386 (5th Cir. 1976) *cert. denied*, 434 U.S. 874 (1977).

B. Federal Occupational Noise Exposure Regulation

This case turns on which of two federal noise exposure standards is applicable to railroad locomotive cab employees. Prior to 1973, no federal noise exposure standards existed. In that year, OSHA promulgated noise exposure regulations generally applicable to all workers in all industries, which consist primarily of a table of time-weighted averages of permissible noise exposure—as noise levels increase, the time that employees can be

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gressional intent to forbid overlapping regulation of working conditions in any given industry by multiple federal agencies. Such redundant control programs offer little except confusion, governmental proliferation, and stultification of enterprise.").

exposed to the noise sources decreases. *See* 29 CFR § 1910.95 (1990).[3]

The FRA, the agency charged by Congress with setting railroad safety standards, also regulates occupational noise. The FRA is empowered by the Federal Railroad Safety Act of 1970 ("FRSA"), 45 U.S.C. § 421, *et seq.*,[4] to conduct research and prescribe standards "for all areas of railroad safety." *Id.* § 431(a).[5] During the late-1970's and early 1980's, the FRA and other divisions of the Department of Transportation studied the effects of locomotive noise on railroad employees.[6] In 1978, the FRA issued a policy statement "to clarify the respective roles of FRA and OSHA in assuring the occupational safety and health of railroad employee[s]." Policy Statement, 43 Fed. Reg. 10,583, 10,585 (1978). Relying on its special expertise in balancing the safety concerns of employees with the safety concerns of rail passengers, the FRA unequivocally asserted its authority to preempt OSHA regulation of rail industry occupational noise:

> FRA views the question of occupational noise exposure of employees engaged in railroad operations, during their involvement in such operations, as a matter comprehended by the regulatory fields over

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[3] Noise levels are stated in "decibels" (commonly denoted by "dB" or "dBA"), a measure of sound pressure.

[4] Congress actually delegated this FRSA authority to the Secretary of Transportation, 45 U.S.C. § 431(a), but the Secretary has delegated his responsibilities to the Administrator of the FRA. 49 CFR § 1.49(m) (1990).

[5] "The purpose of the [FRSA] was to provide comprehensive and uniform safety regulations in all areas of railroad operations." *Chicago Transit Auth. v. Flohr*, 570 F.2d 1305, 1308 (7th Cir. 1977).

[6] One such study concluded "that there does not appear to be a widespread problem of overexposure to noise based on the same type of evaluation as currently used by OSHA (only 1 out of 18 test runs exceeded the criteria)." Roger D. Kilmer, *Assessment of Locomotive Crew In-Cab Occupational Noise Exposure*, DOT Report No. FRA/ORD-80/91 (Dec. 1980).

> which the FRA has exercised its statutory jurisdiction. FRA is therefore responsible for determining what exposure levels are permissible, what further regulatory steps may be necessary in this area, if any, and what remedial measures are feasible when evaluated in the light of overall safety considerations.

43 Fed. Reg. at 10,588.

In 1980, the FRA followed up its 1978 assertion of exclusive regulatory authority with a clear exercise of that authority by promulgating its "Locomotive cab noise" regulations, *see* Railroad Locomotive Safety Standards and Locomotive Inspection, 45 Fed. Reg. 21,092 (1980), 49 CFR § 229.121 (1990), which generally follow the OSHA format but are specifically tailored to the railroad industry.[7]

The OSHA and FRA regulatory schemes remained substantially similar until 1981, when OSHA amended its regulations to add "hearing conservation" standards, which require auditory testing and hearing protection devices for employees whose 8-hour time-weighted noise exposure exceeds 85 dB. The FRA did not reflexively follow suit. As the FRA has long recognized, the propriety of requiring personal hearing conservation protection in locomotive cabs raises unique concerns, including "the need to preserve the alertness of employees to rail transportation hazards affecting the employees, passengers, and the general public along the right-of-way." 43 Fed. Reg. at 10,588. To date, the FRA has not amended its locomotive cab noise regulations to include hearing conservation measures. (It did recently revisit those regulations; it found no "valid basis" for altering them. *See* Quali-

[7] The primary difference between the 1973 OSHA standard and the 1981 FRA standard are the maximum exposure periods—the OSHA regulation is based on the standard 8-hour shift and the FRA regulation is based on the 12-hour shift common in the rail industry. The 8-hour time-weighted permissible average of 90 dB is the same under both regulations.

fications for Locomotive Engineers, 56 Fed. Reg. 28,228, 28,236 (1991).)

Despite the existence of two potentially inconsistent sets of occupational noise standards, dual regulation has presented few problems until now, since the agencies themselves apparently agree on the appropriate jurisdictional boundaries. The FRA claims exclusive authority to regulate rail employee noise exposure, a task to which it has devoted considerable energy. It has reaffirmed the breadth of its statutory jurisdiction over railroad safety on numerous occasions. *See, e.g.*, Bridge Worker Safety Rules, 56 Fed. Reg. 3434 (1991) ("OSHA lacks jurisdiction over safety issues relating directly to railroad operations—a subject over which FRA's authority is *exclusive*") (emphasis added). And, the Occupational Safety and Health Review Commission ("OSHRC"), the adjudicative body established by the OSH Act, *see* 29 U.S.C. §§ 659, 661, has ratified the FRA preemption of OSHA in the railroad safety forum. *See Consolidated Rail Corporation*, 1982 CCH OSHD ¶ 26,044 ("we believe that the [FRA's] policy statement satisfies the requirements of section 4(b)(1) of the Act."); *see also Mushroom Tranp. Co.*, 1973-1974 CCH OSHD ¶ 16,881 (once another federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations covering the same conditions).

C. Proceedings in the Lower Courts

The section 4(b)(1) preemption issue arises here in a suit brought under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, which creates a federal cause of action for railroad employees killed or injured due to the negligence of a railroad. Some courts have held that an employer's violation of an applicable safety regulation (including OSHA safety regulations) establishes negligence per se in a FELA case. *See, e.g.*, *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 264 (1st Cir. 1985). Other courts have held that applicable OSHA regulations provide evidence of the standard of

care imposed on employers. *See, e.g., Albrecht v. Baltimore & Ohio R. Co.*, 808 F.2d 329, 332 (4th Cir. 1987). In addition, FELA eliminates the defense of contributory negligence where violation of an applicable safety satute contributed to the injury or death, 45 U.S.C. § 53, and courts have held that this provision encompasses applicable OSHA regulations, *see, e.g., Pratico*, 783 F.2d at 267. Thus, determining which safety regulations set the standard of care to which a railroad will be held is a key issue in FELA cases.

The plaintiff Bruce Wallace, a Southern locomotive fireman and engineer from 1956 to 1989, brought this FELA suit in the Circuit Court of the City of Norfolk, Virginia, alleging that Southern was negligent in exposing him to excessive noise levels and in not providing a "hearing conservation" program that complies with OSHA noise exposure regulations. Southern contended before, during and after trial that its post-1981 conduct could not be judged against the OSHA standard, since the FRA, the "dominant" agency with respect to railway safety issues, had promulgated locomotive cab noise regulations which differ in material respects from the generic OSHA noise regulations—an action that Southern contended clearly satisfies the section 4(b)(1) preemption test.

Despite repeated and vigorous objections by Southern, *see, e.g.*, App. 10a-13a, the trial court allowed the plaintiff to introduce the OSHA noise exposure regulations (including OSHA's hearing conservation requirements), upon which the plaintiff relied heavily on the issues of duty and standard of care. In addition (and also over Southern's objection, *see* App. 16a), the trial court specifically instructed the jury that it could consider noncompliance with OSHA regulations as evidence of negligence, *see* App. 14a-16a. On September 5, 1990, the jury returned a verdict in favor of the plaintiff in the amount of $350,000. *See* App. 1a. Southern moved to have the verdict set aside, citing, *inter alia*, the court's errors in admitting the OSHA regulations and in instructing the jury to consider noncompliance with those regulations as evi-

dence of negligence. *See* App. 5a-7a On September 17, 1990, the Circuit Court judge entered judgment on the jury verdict in favor of the plaintiff. App. 1a-2a.

Under applicable Virginia law, Southern's only appellate option was to petition the Supreme Court of Virginia for discretionary review. It did so, and that court denied Southern's petition for appeal in a one sentence order stating that "there is no reversible error in the judgment complained of." App. 8a. Southern then filed a petition for rehearing, which was also denied without opinion. App. 9a.

REASONS FOR GRANTING THE PETITION

The decision of the Norfolk Circuit Court has the remarkable effect of punishing Southern for failing to comply with regulations that do not apply to it. Such retroactive standard-setting is plain error that should be corrected. More importantly, the decision widens the split among the lower courts on an important body of uniquely federal law—the appropriate jurisdictional boundaries of the myriad federal agencies that regulate workplace safety. Finally, because FELA and state jurisdiction and venue provisions encourage forum shopping, the Virginia decision promises to have a substantial nationwide impact, completely inconsistent with congressional intent, on the enormous mass of pending and future FELA litigation. Because this case squarely presents a conflict among the courts (both federal and state) on a recurring and important issue of federal law, the Court should grant this petition.

1. The Norfolk Circuit Court erred on an important question of federal law. OSHA's generic noise exposure standards do not apply to railroad locomotive cab noise. No other conclusion can be drawn from a reasoned analysis of the preemption mechanism established by Congress in section 4(b)(1) of the OSH Act. The FRA has plainly "exercise[d] statutory authority to prescribe or enforce standards or regulations affecting" locomotive cab noise, *see* 29 U.S.C. § 653(b)(1), and OSHA's authority is there-

fore at an end with respect to those "working conditions," *id. See Velasquez*, 734 F.2d 216. The FRA has determined that the unique concerns of the rail industry, including the safety of rail pasengers, demand specifically tailored noise exposure regulations that differ from the generic provisions established by OSHA. This is precisely the type of reasoned agency conduct that section 4(b)(1) was designed to promote.

The Norfolk Circuit Court's decision that OSHA noise exposure standards (and in particular OSHA's hearing conservation requirements) are relevant in a locomotive cab noise case, and indeed, that Southern's failure to comply with those standards was evidence of negligence, clearly holds Southern to a different standard of care than that provided by proper application of section 4(b)(1).[8] The state court's rulings thus constitute plain error that should be corrected.

The federal question raised by this petition is of unusual importance for two reasons. First, the broad federal rulemaking effectively undertaken by the Virginia state court ignores important public safety concerns. The

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[8] In his Brief in Opposition to Southern's Petition for Appeal, the plaintiff argued that because Southern has of its own accord taken certain measures to reduce in-cab noise, it has somehow conceded the applicability of the OSHA standard. This argument is obviously without merit. FRA preemption of OSHA safety standards is a matter of federal law determined solely by congressional intent and the FRA's exercise of its statutory authority.

Plaintiff also asserted that any error was "harmless" because the jury might have relied on other evidence of negligence. The record demonstrates otherwise; plaintiff relied heavily and repeatedly on the OSHA hearing conservation standards in making his case on duty and standard of care. As the Fifth Circuit recently held in a similar case of FRA preemption of OSHA standards with a jury instruction nearly identical to the one challenged here: "The jury instruction incorrectly held the railroad to a specific government agency standard of care. This error creates 'a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations.'" *Velasquez*, 734 F.2d at 219, *quoting Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. 1981).

FRA's decisions not to adopt rules identical to those of OSHA in numerous areas, including noise exposure, reflect the FRA's expert balancing of the sometimes conflicting goals of employee safety and passenger and bystander safety. Although Congress plainly intended the FRA's regulations to govern railroad safety practices, the threat of FELA litigation may nonetheless force railroads to adopt every feature of OSHA's employee safety regulations that does not directly conflict with an FRA regulation, regardless of the impact on public safety.

Second, by failing to sustain Southern's section 4(b)(1) preemption claim, the Virginia court has created a conflict between two federal agencies where none previously existed. More importantly, it has muddied the section 4(b)(1) waters with respect to all federal agencies that exercise workplace safety regulatory authority. The location of the jurisdictional boundaries of these various federal agencies is a uniquely federal question that demands a coherent federal answer. Much is at stake as many of the nation's largest industries, including railroads, airlines, pipelines, mine operators, and marine shippers occupy the "grey areas" of potential overlap and conflict. Fifteen years of time-consuming and expensive litigation have failed to produce a clear answer from the lower federal and state courts, and the time has come for this Court to interpret definitively section 4(b)(1) of the OSH Act and provide employers and employees of these and other industries with the tools they need to determine which safety regulations will govern their relationships.

2. As described, *supra*, there is an *existing* circuit split on the proper interpretation of section 4(b)(1) of the OSH Act, and the Norfolk Circuit Court has added yet another branch to an already confused body of law. The federal circuits disagree on both (1) what action the "dominant" federal agency must take to effect preemption of generic OSHA regulations, and (2) the scope

of preemption, that is, the scope of the "working conditions" which the dominant agency carves out of OSHA's jurisdiction by the exercise of its separate regulatory authority.

Resolution of the first disputed issue turns on interpretation of the term "exercise" in section 4(b)(1), and there is profound disagreement among the federal circuits over what agency action amounts to an "exercise" of statutory authority. The Fifth Circuit reasonably concluded that "an assertion of authority in a policy statement is sufficient to displace OSHA regulations." *Velasquez*, 734 F.2d at 218.[9] The First, Second, Third, Fourth, and D.C. Circuits disagree, holding that the "preempting agency must actually promulgate regulations, mere declaration of authority over the area is not enough." *Columbia Gas*, 636 F.2d at 916 n.7; *see also Pratico*, 783 F.2d at 262; *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774, 777-78 (2d Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); *Southern Railway v. OSHRC*, 539 F.2d 335 (4th Cir. 1976); *Baltimore & O.R.R. v. OSHRC*, 548 F.2d 1052 (D.C. Cir. 1976).

On the second issue, the range of opinions is even wider. Some railroads have taken the position in prior cases that Congress' command that the FRA prescribe standards "for all areas of railroad safety," 45 U.S.C. § 431(a), preempts application of all OSHA safety standards in the rail industry. The Secretary of Labor and the OSHRC, by contrast, have argued that the dominant agency's regulations must deal in the same way with the

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[9] *See also Usery*, 539 F.2d at 392 ("as the dominant agency in its limited area, the FRA can displace OSHA regulations by articulating a formal position that a given working condition should go unregulated or that certain regulations—and no others—should apply to a defined subject"); *Templeton v. Chicago & N.W. Transp. Co.*, 570 N.E.2d 467, 471 (Ill. App. 1991).

same "discrete hazard" in the same "working environment" to work a preemption. Under the latter approach, the FRA locomotive cab noise regulations would not preempt OSHA's generic noise regulations, because the FRA has not specifically mandated hearing conservation measures (such as hearing protection devices).[10]

The federal Circuit Courts have rejected both of these interpretations, and have come up with two distinct approaches of their own.[11] Some circuits define section 4(b)(1)'s "working conditions" as "discrete working environments" (e.g., a locomotive cab), while others restrict that term to "discrete hazards" within a given working environment (e.g., occupational noise exposure in a locomotive cab). The Third and Fourth Circuits have adopted the broader "discrete environment" approach, *see U.S. Air v. OSHRC*, 689 F.2d 1191 (4th Cir. 1982); *Southern Railway*, 539 F.2d at 339 ("We think this aggregate of 'surroundings' and 'hazards' contemplates an area broader in its contours than the 'particular, discrete hazards' advanced by the Secretary"); *Columbia Gas*, 636 F.2d at 916, while the First and Fifth Circuits favor the narrower "discrete hazard" approach, *see Usery*, 539 F.2d at 391 ("FRA regulation of portable fire extinguishers will not displace OSHA standards on fire alarm

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[10] This latter approach has been characterized as the "nook and cranny theory of safety regulation," under which OSHA's jurisdiction would extend into every minute detail of the working environment not covered by a specific standard or regulation of the other federal agency. *See Southern Railway*, 539 F.2d at 338. Obviously "[i]f this had been the intention of Congress, there would have been no point in including in the Act an exemption section." *U.S. Air v. OSHRC*, 689 F.2d 1191, 1193 (4th Cir. 1982).

[11] The courts that have addressed the scope of preemption all begin with this Court's definition of "working conditions" in the Equal Pay Act context as "surroundings" and "physical hazards" "regularly encountered" by workers. *See Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

signaling systems."); *PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 896 (1st iCr. 1981).

The decision of the Norfolk Circuit Court conflicts with *both* of these lines of federal circuit court cases. The FRA regulations at issue here are clearly addressed at the "discrete working environment" (i.e., locomotive cabs) to which Southern argues the OSHA noise regulations do not apply, and the Norfolk Circuit Court's decision is thus inconsistent with the Fourth Circuit approach. Moreover, the FRA regulations are directed at a discrete hazard within that environment (i.e., noise) and are also inconsistent with the Fifth Circuit approach. The Norfolk Circuit Court has, in effect, adopted the "nook and cranny" approach flatly rejected by the federal courts —that the OSHA noise regulations are not preempted simply because they are *different* than the competing FRA regulations.

Given the existence of a lower court split and the unquestionable importance of the federal law issues presented, the principal question here is whether this case presents a suitable vehicle for definitively interpreting section 4(b)(1). This case presents an ideal vehicle for resolving the (now) three-way split among the lower courts that have concurrent jurisdiction over FELA claims on the proper scope of section 4(b)(1) preemption. The OSHA hearing conservation measures relied upon by the plaintiff in this case have no direct counterpart in the competing FRA regulations, and the scope issue is thus squarely presented. It is also central to the outcome of the case; if OSHA noise regulations do not apply to locomotive cabs, a railroad's failure to comply with them can hardly be deemed evidence of negligence. Moreover, by granting the petition the Court can prevent any widening of the lower court split on what action consummates preemption. The FRA has both articulated a formal statement that it alone has authority to regulate locomotive cab noise exposure and enacted regu-

lations pursuant to its asserted authority. Thus, whatever the appropriate point of preemption on the dominant agency action continuum, some preemption has occurred here, and the Norfolk Circuit Court's judgment to the contrary rests on an erroneous legal conclusion that should not be allowed to stand.[12]

The Virginia courts' failure to issue written opinions in this case should provide no basis for denying review. The existence of written conflicting opinions by the First, Second, Third, Fourth, Fifth and D.C. Circuits ensures that the lack of an opinion in this case will not hinder this Court's deliberations. Moreover, this Court has in the past granted certiorari to review orders issued without opinion on numerous occasions when the significance of the issues raised and the procedural posture of the case warranted this Court's review.[13] These factors clearly support a grant of this petition. Virginia is one of only two states that provides no appeal of right from adverse trial court decisions, and the Virginia Supreme Court denied discretionary review here without explanation.[14]

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[12] As discussed in detail, at pp. 16-17, *infra*, state and federal courts have concurrent jurisdiction over FELA claims, and the FELA jurisdictional scheme encourages forum shopping. The availability of a state forum amenable to OSHA-based FELA claims thus makes it highly unlikely that this Court will be presented with a suitable federal circuit court decision for review of the important section 4(b)(1) issues raised in this petition.

[13] *See, e.g., Mallard v. United States District Court*, 490 U.S. 296 (1989); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 76 (1988); *Taylor v. McKeithen*, 407 U.S. 191 (1972); *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 147 (1975); *Will v. United States*, 389 U.S. 90, 94 (1967); *Lytle v. Household Mfg., Inc.*, 492 U.S. 917 (1989); *Carden v. Arkoma Assoc.*, 490 U.S. 1045 (1989).

[14] Denial of appeal by the Virginia Supreme Court does not give the Norfolk Circuit Court's decision the precedential effect of a Virginia Supreme Court merits decision. *See, e.g., Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750, 755 n.2 (Va. 1984). However, the practical precedential effect of the Circuit Court's decision

Thus, the Norfolk Circuit Court's misapplication of federal law has to date been completely insulated from appellate review.[15] It would be highly inappropriate to allow important issues such as the one raised in this case to escape review by this Court simply because the Virginia courts do not see fit to state the reasons behind their decisions.

3. An independent ground for granting this petition is the potential for forum shopping in the wake of the state court decisions below—a concern which is fueled by the fact that the decisions below were rendered in the context of FELA litigation. A FELA claim can be brought in any jurisdiction in which a railroad company does business, and a single lower court misinterpretation of section 4(b)(1) is quickly magnified in importance as that jurisdiction becomes a mecca for similar FELA claims. Thus, the Norfolk Circuit Court currently sits as the self-appointed dean of workplace safety jurisdictional boundaries between two federal agencies, the FRA and OSHA. It has ignored congressional and agency intent in drawing that boundary and only this Court can correct the error.

To understand the enormous impact that this single aberrant state court ruling will have on the entire federal workplace safety regulatory scheme, it is necessary to review briefly the FELA jurisdiction provision, Virginia state law on jurisdiction and venue, and federal removal provisions. The jurisdiction of federal courts under FELA is "concurrent with that of the courts of the several States." 45 U.S.C. § 56. Moreover, the de-

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is greatly magnified due to the liberal Virginia and FELA venue and jurisdictional provisions discussed in detail at pp. 16-17, *infra*.

[15] *Cf.* Graham C. Lilly and Antonin Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 Va. L. Rev. 3, 16 (1971) (noting that if "one feels that no man's property or liberty should be disposed of by the unappealable determination of a single individual," the appellate process in Virginia faces a crisis).

fendant may not remove a FELA claim brought in state court to a federal district court. 28 U.S.C. § 1445. Thus, subject only to state jurisdiction and venue constraints, plaintiffs have near absolute discretion with respect to forum in FELA cases.

The Commonwealth of Virginia welcomes FELA plaintiffs. Virginia courts may exercise personal jurisdiction over any person "transacting any business" in the Commonwealth of Virginia. Va. Code Ann. § 8.01-328.1; *see also Industrial Carbon Corp. v. Equity Auto & Equip. Leasing Corp.*, 737 F. Supp. 925, 927 (W.D. Va. 1990), *dismd. without op.* 922 F.2d 835 (4th Cir. 1991) (the only real limitation on the exercise of personal jurisdiction under the "transacting business" provision is the Due Process Clause of the Fourteenth Amendment). And, venue is proper in any county or city where, *inter alia*, the defendant "regularly or systematically conducts affairs or business activity." Va. Code Ann. § 8.01-262. Two of the Nation's largest railroad systems, CSX Transportation and the Norfolk Southern railroads [16] do business throughout Virginia. The potential for destructive forum shopping in the wake of the decisions of the Virginia state courts in this case—which, in effect, wrote section 4(b)(1) out of the OSH Act and thus effectively mandated the dual regulation that Congress sought to avoid—is thus obvious.

The stakes are enormous. Railroad FELA litigation has reached epidemic status in recent years. Nationwide there are more than 28,000 FELA hearing loss claims and suits against the Nation's railroads.[17] CSX Trans-

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[16] Norfolk and Western Railway Company and Southern Railway Company (recently renamed Norfolk Southern Railway Company) are wholly-owned subsidiaries of Norfolk Southern Corporation, a Virginia corporation.

[17] Association of American Railroads, *1990 Report of Claim & Litigation Experience* at 4-5 (*"AAR 1990 Report"*). FELA claims represent a staggering drain on the railroad industry. Although

portation and the Norfolk Southern railroads are defendants in more than 3,400 FELA suits, of which over 2,100 involve hearing loss claims. Any injured employee of these railroads (and any other railroad that "transacts business" in Virginia), regardless of his residence or the place of occurrence of the accident, may now take advantage of the Norfolk Circuit Court's erroneous finding that OSHA noise standards are relevant in the locomotive cab environment. Thus, while OSHA and the FRA agree that OSHA noise exposure regulations do not apply to locomotive cab employees—the only position consistent with Congress' section 4(b)(1) mandate—in the real world where dollars change hands and primary behavior is shaped, those preempted OSHA regulations apply with full force (notwithstanding the lack of a published opinion in this case).[18]

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railroad employment declined by more than 40 percent and reported railroad employee injuries fell by more than half during the 1980s, total FELA payouts by rail carriers *more than doubled* from $398 million in 1981 to $811 million in 1988. *See Federal Employers' Liability Act: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989) (prepared statement of William H. Dempsey, President of the Association of American Railroads) at 6. By 1990, the total FELA payout had increased to $877 million (of which hearing loss cases accounted for $103.6 million). *AAR 1990 Report* at 1-5. In 1990 alone, over 55,000 FELA claims were reported (of which 27,095 were hearing loss claims), and plaintiffs filed over 7,900 FELA lawsuits (3,470 of which were hearing loss lawsuits). *Id.* at 1-5, 4-5.

[18] Such broad federal rulemaking by a lower state court is particularly troubling where, as here, there are other safety concerns at stake. Thus despite the FRA's implicit decision that employee alertness and public safety concerns, see pp. 6-7, *supra*, outweigh any benefits to be derived from hearing conservation measures, railroads amenable to suit in Virginia will adopt hearing conservation measures (or pay FELA dollars for the privilege of complying with the FRA standard).

Southern's concern is more than idle speculation. Norfolk and neighboring Portsmouth have been aptly characterized as "happy hunting ground[s]" for FELA plaintiffs:

> [a]ttorneys representing railroad employees claiming job-related injuries occurring all over the continental United States apparently think it worthwhile to bring actions against railroads in Portsmouth, or in neighboring Norfolk, rather than in the localities in which the accident occurred.

Caldwell v. Seaboard System R.R., Inc., 380 S.E.2d 910, 915 (Va. 1989) (Russell, J., dissenting), *cert. denied*, —— U.S. —— (1990). In fact, more than a dozen hearing loss suits are presently pending in Norfolk Circuit Court against Southern alone.[19] The Court can put an end to this destructive forum shopping by granting this petition and fixing the proper interpretation of section 4(b)(1).

In summary, this case presents an important question of federal law which has not been, but should be, settled by the Court. The Court should grant this petition to resolve the conflict in the lower courts regarding section 4(b)(1) of the OSH Act and provide employers, employees, and lower courts with proper guidance as to the jurisdictional boundaries of the various federal agencies that regulate workplace safety.

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[19] Nor are the forum shopping problems evidenced by the concentration of FELA cases in Norfolk an isolated event. In *Gardner v. Norfolk & Western Ry.*, 372 S.E.2d 786 (W.Va. 1988), *cert. denied*, 489 U.S. 1016 (1989); the West Virginia Supreme Court held that the doctrine of forum non conveniens did not apply to cases brought under FELA. In the following two years, 818 FELA cases were filed in the Circuit Court of Brooke County, West Virginia, 644 of which involved plaintiffs who did not reside in West Virginia. *See Norfolk and Westren Ry. v. Tsapis*, 400 S.E.2d 239, 241 (W.Va. 1990). Citing "the changing needs of our society" the West Virginia Supreme Court recently overruled *Gardner. Tsapis*, 400 S.E.2d at 243-44.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILEY F. MITCHELL, JR.
STEVEN J. ANTHONY
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
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Counsel for Petitioner

* Counsel of Record

September 5, 1991

APPENDIX

APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK
ON THE 5th DAY OF SEPTEMBER, 1990

At Law #L88-973

BRUCE L. WALLACE,

Plaintiff

vs.

SOUTHERN RAILWAY COMPANY,

Defendant

ORDER

This day came again the plaintiff, BRUCE L. WALLACE, in person and by counsel and again came the defendant, SOUTHERN RAILWAY COMPANY, by representative and by counsel, and came as well the same jury heretofore impanelled and sworn pursuant to adjournment on the 4th day of September, 1990.

Thereupon the Court and the jury reconvened and heard closing arguments. The jury received the instructions from the Court and Catherine Poyner (the alternate) was discharged from further jury service. Then, the jury retired to the jury room to consider their verdict. And after some time, the jury returned into open Court with a verdict in the following words: "We, the jury, on the issues joined find in favor of the plaintiff and assess his damages at $350,000.00. /s/ George Buchan, Jr, Foreperson."

Whereupon, the defendant, by counsel, moved the Court to poll the jurors as to their said verdict, to which poll the jurors replied that the verdict herein recorded was his or her verdict.

Then, the defendant, by counsel, renewed all of his previous motions and also moved the Court to set aside the verdict as contrary to the law and the evidence and to enter summary judgment or in the alternative, grant a new trial, which motions were overruled and to which ruling of the Court, counsel for the defendant excepts.

Therupon, the Court discharged the jurors from further consideration of this case.

Whereupon it is considered, adjudged and ORDERED by the Court that the plaintiff, BRUCE L. WALLACE, recover of and have judgment against the said defendant, SOUTHERN RAILWAY COMPANY, in the sum of THREE HUNDRED FIFTY THOUSAND DOLLARS AND NO CENTS ($350,000.00) with interest at the legal rate of percentum per annum from the 6th day of September, 1990 until paid, together with the costs of his suit herein expended, and this matter is ENDED and REMOVED from the docket of this Court.

ENTERED: 9/17/90

/s/ Jerome James
JEROME JAMES
Judge

(clerk/vrb)
ord.6rr

VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK
ON THE 4TH DAY OF SEPTEMBER, 1990

At Law #L88-973

BRUCE L. WALLACE,

Plaintiff

vs.

SOUTHERN RAILWAY COMPANY,

Defendant

ORDER

This day came again the plaintiff, BRUCE L. WALLACE, in person and by counsel, and came again the defendant, SOUTHERN RAILWAY COMPANY, by representative and by counsel, and came as well the same jury heretofore impanelled and sworn pursuant to adjournment on the 31st day of August, 1990.

Since the trial of this case will not be concluded within the August term of this Court, the Court, pursuant to Section 17-26 of the Code of Virginia (1950), as amended, ORDERED the trial of this case to continue until it is concluded and this case disposed of.

It is further ORDERED that the jurors previously drawn and selected shall continue to serve as jurors in this case until the trial is concluded, to-wit: Berly Barge, George Buchan, Charles Copeland, Vivian Harvey, Mary Holley, Laurel Landry and Chandra Page, and one alternate, Catherine Poyner.

And the Court and the jury resumed hearing the evidence presented on behalf of the defendant. At the conclusion thereof, the defendant rested.

By agreement of counsel, the defendant's defense of contributory negligence is withdrawn.

The plaintiff, by counsel, moved to strike the evidence of the defendant on grounds stated in the record, which motion was overruled and to which ruling of the Court counsel for the plaintiff excepted.

Then, the defendant, by counsel, renewed his motion to strike the plaintiff's evidence, on the same grounds, which motion was overruled and to which ruling of the Court counsel for the defendant excepted.

And the Court adjourned, and the jury was allowed to depart at 2:20 p.m., pursuant to the adjournment order, however, the Court and the parties continued to review the jury instructions until 7:00 p.m. and will reconvene on the 5th day of September, 1990 at 10:30 a.m.

ENTERED: 9/17/90

/s/ Jerome James
JEROME JAMES
Judge

(clerk/vrb)
ord.5rr

[1176] VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK

At Law No. L88-973

BRUCE L. WALLACE,

Plaintiff,

v.

SOUTHERN RAILWAY COMPANY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

September 5, 1990

Volume VI

Before: Honorable Jerome James, Judge, and a Jury

APPEARANCES:

SAMS, DONATO, SPIER & HASTINGS
By: BRIAN J. DONATO, ESQUIRE
HOWARD A. SPIER, ESQUIRE
and

WHITE, JOHNSON & LAWRENCE
By: WILLIAM S. SANDS, JR., ESQUIRE
Counsel for the Plaintiff

WILLIAMS, WORRELL, KELLY, GREER
& FRANK
By: SAMUEL J. WEBSTER, ESQUIRE
DANIEL R. WARMAN, ESQUIRE
Counsel for the Defendant

* * * *

[1304] MR. WEBSTER: We would move to set aside the verdict as contrary to the law and the evidence, and included with that would be the moving to set it aside because of the errors in the granting of jury instructions and to set it aside because on the bases of the motions to strike that we had made, and basically that is that the instructions dealing with FRA and the instructions dealing with OSHA were improperly granted and improperly included in this case and as we argued to Your Honor and moved early on in the case the FRA—the OSHA evidence shouldn't have even come in because it's preempted by FRA, and moreover there should be separate cause of action for FRA, and FRA shouldn't have been put in the instructions the way it was. And I've already objected to those specific instructions, but I want to renew those motions.

[1305] And we also want to move for a new trial to set aside the verdict and move for a new trial on the basis of our objections to evidence that has been admitted and that's already been ruled on by the Court.

Also, I would move to set aside on the basis that it was error for the Court to allow the jury to consider future earnings for the reasons previously stated, primarily based upon Mr. Wallace's own testimony.

THE COURT: Anything else?

MR. WEBSTER: That's all, Your Honor. Thank you.

THE COURT: All right.

MR. DONATO: Very briefly, Your Honor. We believe that the Court properly reviewed the evidence, properly ruled on the testimony, properly instructed the jury, properly included instructions on the OSHA as guidance for the jury, the FRA, if applicable, if it was violated, properly instructed the jury otherwise on the FELA related law.

In no way do we agree with the defense counsel there should be grounds for a mistrial in this case or a new trial or a directed verdict. This jury took in excess of five hours to decide this case. It is well and truly tried.

I think if there were any errors that were attempted to be injected into the case they were more [1306] than cured by the rulings of the Court, and in short, Judge, we would ask you to deny all motions and sustain the verdict and enter it by your judgment in this case.

THE COURT: All right. Mr. Webster?

MR. WEBSTER: Yes, sir. Your Honor, I don't know that there's anything else I can add to the arguments that have been advanced to this court since August 27th.

THE COURT: All right. All of your motions are respectfully overruled. I'll note your exception to each ruling of the Court. And the verdict of the jury will be entered.

* * * *

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 27th day of February, 1991.

Record No. 901683

Circuit Court No. L88-973/L2295-90

SOUTHERN RAILWAY COMPANY,
Appellant,

against

BRUCE L. WALLACE,
Appellee.

From the Circuit Court of the City of Norfolk

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:
DAVID B. BEACH
Clerk

By: /s/ [Illegible]
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 7th day of June, 1991.

Record No. 901683

Circuit Court No. L88-973/L2295-90

SOUTHERN RAILWAY COMPANY,
Appellant,

against

BRUCE L. WALLACE,
Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 27th day of February, 1991 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ David B. Beach
Clerk

[1] VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK

At Law No.: L88-973

BRUCE L. WALLACE
Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Date: August 27, 1990

Before: THE HONORABLE JEROME JAMES

Appearances:

WHITE, JOHNSON & LAWRENCE
Attorneys for the Plaintiff
1404 First Virginia Bank Building
Norfolk, Virginia 23510
BY: WILLIAM S. SANDS, JR., ESQUIRE
Of Counsel.

SAMS, DONATO, SPIER & HASTINGS
Attorneys for the Plaintiff
66 West Flagler Street
Miami, Florida 33130
BY: BRIAN J. DONATO, ESQUIRE &
HOWARD SPIER, ESQUIRE
Of Counsel.

WILLIAMS, WORRELL, KELLY, GREER & FRANK
Attorneys for the Defendant
600 Crestar Building
Norfolk, Virginia 23514
BY: DANIEL R. WARMAN, ESQUIRE &
SAMUEL J. WEBSTER, ESQUIRE
Of Counsel.

* * * *

[24] MR. WARMAN: I'd like Your Honor to rule on the record, then what you're going to say that they can introduce. Evidence of OSHA standards after August 31, 1981 which include a hearing conservation program? I have to ask that Your Honor put that on the record so that we'll have this point on appeal.

THE COURT: Okay. All right. That's on the record.

* * * *

[25] MR. WEBSTER: Judge, just to clarify your ruling, your ruling of evidence of the OSHA standards subsequent to August 31, 1980 will be admissible in this case?

THE COURT: That's correct.

MR. WEBSTER: All right. Then we'd obviously like to note our objection and exception to that ruling for the reasons already stated in argument.

The COURT: All right.

* * * *

[951] VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK

At Law No. L88-973

BRUCE L. WALLACE,
Plaintiff,

v.

SOUTHERN RAILWAY COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

September 4, 1990

Volume V

Before: HONORABLE JEROME JAMES, Judge, and a Jury

Appearances:

SAMS, DONATO, SPIER & HASTINGS
By: BRIAN J. DONATO, ESQUIRE
HOWARD A. SPIER, ESQUIRE
and
WHITE, JOHNSON & LAWRENCE
By: WILLIAM S. SANDS, JR., ESQUIRE
Counsel for the Plaintiff

WILLIAMS, WORRELL, KELLY, GREER & FRANK
By: SAMUEL J. WEBSTER, ESQUIRE
DANIEL R. WARMAN, ESQUIRE
Counsel for the Defendant

* * * *

[1075] MR. WEBSTER: Your Honor, as I understand the Court's earlier rulings, the Court has ruled that OSHA is admissible in this case as evidence, factual evidence, of negligence but it is not the law in this case, and I would respectfully renew our objection to that earlier ruling, and I think that the propagation of this instruction by the Plaintiff points up, in our view, the problems with that ruling.

This instruction is supposed to be an instruction of law by the Court, and OSHA is nothing but factual evidence in this case. This instruction would emphasize that factual evidence to the exclusion of all other, and notwithstanding that the instruction says it's evidence, it smacks of a finding instruction, and I think it's improper to emphasize evidence to give the imprimatur of law to a ruling that the Court has said OSHA is evidence of negligence and to comment on the evidence by instructions, and we would respectfully object, first, to the Court's earlier ruling about FRA not preempting OSHA in the area of noise exposures in the engine cabs but more [1076] strenuously object to the giving of that instruction on that basis as well as what I've just noted here. It's commenting on the evidence. It emphasizes certain evidence to the exclusion of other evidence in this case, and that's not the purpose of jury instructions.

* * * *

[1176] VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK

At Law No. L88-973

BRUCE L. WALLACE,
Plaintiff,

v.

SOUTHERN RAILWAY COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

September 5, 1990

Volume VI

Before: Honorable Jerome James, Judge, and a Jury

Appearances:

SAMS, DONATO, SPIER & HASTINGS
By: BRIAN J. DONATO, ESQUIRE
HOWARD A. SPIER, ESQUIRE
and
WHITE, JOHNSON & LAWRENCE
By: WILLIAM S. SANDS, JR., ESQUIRE
Counsel for the Plaintiff

WILLIAMS, WORRELL, KELLY, GREER & FRANK
By: SAMUEL J. WEBSTER, ESQUIRE
DANIEL R. WARMAN, ESQUIRE
Counsel for the Defendant

* * * *

[1206] [THE COURT:] The Court instructs the jury that you may consider as evidence in this case the Occupational Safety and Health Act, in parentheses OSHA, provisions of 29 Code of Federal Regulations Section 1910.95 *et seq.* which provides as follows:

In parentheses, (a), Protection against the effects of noise exposure shall be provided when the sound level exceeds those shown in table G-16;.

B) (1) When employees are subjected to sound exceeding those listed in table G-16, feasible administrative or engineering controls shall be utilized. If such controls failed to reduce sound levels within the level of table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

Table G-16, referred to above, sets forth the permissible noise exposure within the workplace over a period of an eight-hour day.

[1207] You will find in this instruction—and I don't see the need to—you have two columns. One, it says duration per day in hours. The column to the immediate right of that says sound levels and dBA, which would be—I don't see where I need to list all of those, but I will give you one duration per day, and hours is eight. Sound level, dBA, is 90. And then it goes down from eight to six to four to three to two, one and a half, one, one half, and the sound level goes from 90 down to 115 dBA.

Now, according to Section 1910.95(c) of the OSHA regulation enacted in March 1984, the employer shall administer a continuing, effective hearing conservation program. Whenever employee knows exposure, noise exposures, equal or exceed an eight-hour time weighted average sound level of 85 decibels.

The foregoing regulations could be considered by you merely as one more piece of evidence on the issue of negligence. The regulations are not conclusive or binding on you and the application of the regulations to the facts of the case are solely for your determination as is

the weight to be given to the regulations in determining the issue of negligence.

If you find from the greater weight of the evidence that the above OSHA regulations have been [1208] violated with respect to the noise levels inside the locomotive engine to which Plaintiff Wallace was assigned at the times and places in question, you might consider such violations as evidence of negligence.

* * * *

[1294] [MR. WEBSTER:] Defendant objects to instruction 17 on the ground that any reference to OSHA regulations was improper [1295] on the ground that FRA preempts OSHA in the area of noise exposure, the locomotive cab to an engineer.

* * * *